

NTSB Order No.
EM-87

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 22nd day of June, 1981

JOHN B. HAYES, Commandant, United States Coast Guard

v.

WINFRED F. MONTGOMERY, Appellant.

Docket No. ME-86

OPINION AND ORDER

The appellant seeks review of a decision of the Commandant affirming the revocation of his Merchant Mariner's Document Z-996845 ordered by Administrative Law Judge Francis X.J. Coughlin on March 18, 1980, following an evidentiary hearing conducted on December 20, 1979.¹ The revocation was premised on findings that the charge and specifications that appellant had wrongfully possessed marijuana while in the service of the SS MORMACARGO had been proved. The possession therefore constituted misconduct in violation of 46 U.S.C. 239(g).

For the reasons that follow, we conclude that the revocation must be reversed because the evidence on which the charge of misconduct was based was obtained as the result of an unconstitutional search and should therefore have been suppressed.²

On October 29, 1979, agents of the U.S. Customs Service boarded the SS MORMACARGO for the purpose of searching it for contraband. The ship was berthed at the dock in Philadelphia. The record does not disclose how long the ship had been stationed there, where it had come from, how long it was to remain in that port, or where its next port of call might be. The Customs agents, acting without a search warrant and without any information that

¹Copies of the decisions of the Commandant and the law judge are attached.

²The Commandant has not filed a reply brief in opposition to this seaman appeal.

contraband might be aboard the ship, proceeded to search the entire ship including its cabins. They were aided in this effort by a narcotics detecting dog, which was said to have "alerted" outside of appellant's room.³ A search of that cabin, with the dog's help, produced three marijuana cigarettes located in a pocket of a pair of trousers allegedly owned by appellant, who at this time was ashore.⁴ The agents seized the marijuana and decided to wait for appellant on the dock. When he appeared, some 30 to 45 minutes later, they stopped and searched him. Apparently while searching through appellant's briefcase, appellant tossed something into the water between the dock and the ship. An object resembling the item tossed was subsequently taken from the water. It turned out to be a cigarette pack containing five marijuana cigarettes. Appellant was then arrested and this revocation proceeding ensued.

On appeal appellant maintains that the warrantless searches of his cabin and his person were unlawful. We think it necessary to determine only whether the search of his cabin was proper because, if it were not, the marijuana seized in the course of the dockside search would be tainted with the illegality attending the cabin search.⁵ See Wong Sun v. United States, 371 U.S. 471 (1963).

The customs agents claimed that the challenged searches were authorized by virtue of 19 USCA sections 482 and 1581.⁶ Section

³There is no testimony concerning the canine's training, what the dog was trained to alert to, or how the dog manifested an "alert."

⁴No evidence was produced to show that appellant was ever actually on the ship, or how the Customs agents obtained their belief that this particular cabin was appellant's. Appellant had signed articles to serve as an electrician on the ship two days earlier in New York City. Whether the signing took place on the ship is not addressed in the record.

⁵In this connection we note the Customs agent's testimony to the effect that the dockside detention and search would not have been made but for the discovery of the drug in appellant's cabin. See Transcript at page 34.

⁶19 USCA §§482 and 1581(a) provide, in pertinent part, as follows:

"§482 Search of vehicles and persons.

Any of the officers or persons authorized to board or search vessels may stop, search, and examine,... any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced

482 requires that the searches it authorizes be based on at least a suspicion or reasonable cause to believe that the search will reveal some breach of the customs laws it addresses. Section 1581(a), on the other hand, purports to authorize the routine search of vessels without any prior belief that a customs law violation may be discovered. Since the search of the SS MORMACARGO was not based on any prior information concerning a possible violation of law, Section 1581(a) is the statutory provision applicable to that search.

Despite the seemingly unbridled search authority section 1581 appears to bestow upon customs agents, the courts, in recognition of the principle that "[n]o Act of Congress can authorize a violation of the Constitution",⁷ have applied this provision in light of traditional Fourth Amendment criteria concerning the reasonableness of a specific search and seizure.⁸ It has accordingly been held that a search conducted under section 1581 must be based on probable cause or consent or must be justifiable as an exception to those standards. United States v. Stanley, 545 F.2d 661, 665 (9th Cir. 1977), cert. denied, 436 U.S. 917 (1978).⁹

into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope , wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law...."

§1581 Boarding vessels

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

⁷ Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

⁸ "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government" (Brinegar v. United States, 338 U.S. 160, 180 (Jackson, J., dissenting)).

⁹Such holdings reflect the constitutional doctrine that warrantless searches are per se unreasonable unless they fall

One such exception of those standards involves border searches. The search of the SS MORMACARGO, conducted without warrant, probable cause or consent, was valid if made pursuant to the border search exception.¹⁰ We conclude that it was not.

The border search exception gains its vitality from the important and various interests the government has in regulating the movement of individuals and property, lawful and otherwise, across national borders. See Almeida-Sanchez v. United States, *supra*, 413 U.S. at 272; Carroll v. United States, 267 U.S. 132, 154 (1925). Our research has disclosed no instance, however, in which a court has upheld a warrantless search, under the border search exception, when there was absolutely no evidence that the person or conveyance searched had crossed or was about to cross a border. In fact, the crossing of a border appears to be the touchstone for applying the exception. See, e.g., United States v. Zurosky, 614 F.2d 77., 787-88 (1st Cir. 1979) ("If the evidence supports a finding that the vessel crossed the three mile territorial waters' mark or if there are articulable facts from which the customs agents may reasonably infer that the vessel has come from international waters, then the search may be upheld as a border search pursuant to 19 U.S.C. 1581."); see also, Administrator v. Danielson, NTSB Order EA-971 (1977). To find that the warrantless search here without probable cause was reasonable, solely because of the location of the ship in an international port, would stretch the border search exception far beyond what we perceive the current state of the law to be.¹¹ We decline to do so. Instead, we believe we are constrained to hold, on the record before us, that the exploratory search of the SS MORMACARGO was an unreasonable and,

within one of "*** a few specifically established and well-delineated exceptions *** jealously and carefully drawn ***". Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The government, of course, bears the burden of establishing the existence of "such an exceptional situation". Vale v. Louisiana, 399 U.S. 30, 34 (1970).

¹⁰The record does not disclose whether the search of the ship was made with the consent of anyone aboard the vessel. We are not free to speculate as to the circumstances bearing on this issue. See United States v. Hoffman, 607 F.2d 280 (9th Cir. 1979).

¹¹Customs agents must secure a warrant before searching "any dwelling house, store or other building or place * * *" under 19 U.S.C.A. section 1595. A large ship, not readily mobile, which may be scheduled to remain in port for a significant length of time, clearly cannot be said to be totally unlike a dwelling place for the seamen living aboard it.

therefore, an unlawful one.¹²

For the foregoing reasons we conclude that appellant's motion to suppress the illegally seized evidence should have been granted and the evidence excluded.¹³ We have previously recognized the applicability of the exclusionary rule to the administrative hearings subject to our review on appeal, see Administrator v. Danielson, supra, and we find that the purpose underlying the rule of deterring future unlawful conduct by federal agents justifies its application in this instance.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal of Winfred F. Montgomery is granted;
2. The decision of the Commandant affirming the law judge's order revoking appellant's seaman documents is reversed; and
3. Appellant's seaman document be returned to him on request.

KING, Chairman, McADAMS and GOLDMAN, Members of the Board, concurred in the opinion and order. DRIVER, Vice Chairman and BURSLEY, Member, disapproved. See statement attached.

In our view it is not necessary that the record have affirmatively established that the SS MORMACARGO had recently crossed the international border to bring the search of the vessel within the border search exception, considering that the search involves a seagoing vessel with a full crew aboard, moored at an international port facility.

Even so, if the case had rested solely on the shipboard seizure we would agree that the finding of a violation should be overturned since the evidence in the record connecting the

¹²The invalidity of the search of the ship would not be cured even if we were to find that the agents, having begun an improper search, subsequently developed, by virtue of the canine's behavior, the belief that contraband might be within a cabin. See United States v. Williams, 544 F.2d 807, 810 (5th Cir. 1977).

¹³Criminal charges for possession of marijuana prosecuted against appellant in a state court in Philadelphia were dismissed on the basis of illegal search and seizure. The Commandant's reliance on Commandant v. Powe, 1 NTSB 2292 (1972) and United States v. Beck, validity of the dockside search herein overlooks the fact that those cases did not involve searches based on information illegally obtained.

respondent with the marijuana found in the cabin is not of a sufficiently reliable and probative character to establish a violation. However, while the evidence in the record regarding the shipboard seizure is inadequate to establish a violation by respondent it is enough to support a finding (if such a finding is needed, which we doubt in the case) that the customs agents had a "reasonable suspicion" as a basis to detain respondent on the pier and to search him. Therefore, we conclude that the evidence that respondent possessed marijuana on the pier is untainted by a previous unauthorized search and that is otherwise legally admissible; it is of a reliable and probative character.

Accordingly we would affirm a finding of wrongful possession of marijuana while in the service of the SS MORMACARGO and the sanction of revocation.